IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 28TH MAY 2007 / 7TH JYAISHTA 1929

WP(C).No. 20552 of 2004(V)

AGAINST THE ORDER IN IA.1280/2000 IN OS.339/1996 of M.C.,PATHANAMTHITTA

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PETITIONER:

THOMAS VARGHESE, S/O.VARGHESE,
KOYITHOTTATHUVEETTIL, NEDUPARAYAR MURI,
THOTTAPUZHASSERY VILLAGE.

BY ADV. SRI.P.HARIDAS

RESPONDENTS: DEFENDANTS.

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1. K.S.JAYARAMAN, KOLLAYIL PURAYIDATHIL VEETTIL, NEDUMPRAYAR MURI, THOTTAPPUZHASSERY VILLAGE.

2. GEETHA, W/O.K.S.JAYARAMAN, KOLLAYIL PURAYIDATHIL VEETTIL, NEDUMPRAYAR MURI, THOTTAPPUZHASSERY VILLAGE.

BY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 28/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE ORDR DATED 8.6.2000 IN I.A. NO.1280/2000 IN O.S. NO.339/1996

PIUS C. KURIAKOSE, J.

W.P.(C) NO.20552 OF 2004

Dated this the 28th day of May, 2007

JUDGMENT

This writ petition under Article 227 has been filed by the plaintiff impugning Ext.P1 order of the learned Munsiff by which the learned Munsiff dismissed the application for appointment of Commissioner as well as surveyor for ascertaining the obstructions or encroachment made by the respondents on plaint item No. 2, which is a pathway. Even though both the respondents have been served with notice by this court, none of them have come forward to enter appearance to resist prayers in this writ petition. Two reasons seems to have waived with the learned Munsiff for dismissing the Commission application. Firstly, commissioner's report and sketch are already available and the petitioner is not entitled to apply for a fresh commission without getting the earlier report set aside and that the objective in filing the present commission application is to circumvent the

findings entered by the commissioner in his earlier report. Secondly, even though the petitioner has a case that the defendants have encroached into the plaint schedule pathway and annexed a portion of the pathway within their property after the visit of the Commissioner, absolutely nothing is stated in the affidavit in support of the commission application regarding the encroachment.

2. Mr.P.Haridas, the learned counsel for the petitioner has made available for my perusal a copy of the commission application and on reading through the affidavit, I have no doubt in my mind that the learned Munsiff was justified in observing that the affidavit was quite inadequate. Nevertheless I feel that the application could have been allowed since the learned Munsiff had before him the amended plaint and the impugned order appears to have been issued on the basis of the perusal of the amended plaint also. The amended plaint contains averments regarding the trespass subsequent to the first visit by the Advocate Commissioner. Having relied on the amended plaint also, the learned Munsiff should not have dismissed the

application on the ground of insufficiencies of the affidavit.

3. As regards the first reason that a fresh commission cannot be issued without setting aside the earlier commission report, it should be noticed that the first commission report is an ex parte commission report. The appointment of the commissioner as well as the inspection were made in the absence of the respondents. Moreover, the main purpose for which the commission is sought for second time is to identify the subject pathway on the basis of the re-survey records, which according to the amended plaint, contains the existence of the pathway. In other words, there will not be any conflict between the earlier commission report (even if it is admitted in evidence after examining the commissioner) and the report which the Commissioner may file on the basis of the present application being allowed. The second report will be one based on the measurement of the pathway with reference to the resurvey records. The sketch produced along with the earlier report is only a rough sketch not prepared on the basis of a survey measurement. The suit, as can be seen, has been amended as

one for declaration of a public pathway and also of a mandatory injunction to remove obstructions allegedly placed on the same by the respondents. I feel that report as sought for by the petitioner through I.A. No.1280/2000 will be of considerable assistance to the court to resolve the issue which will arise for consideration on the basis of the amended pleadings. The learned Munsiff, having relied on the amended plaint, was not justified in dismissing the application on the reason of inadequacy of the averments in the affidavit.

The result of the above discussion is that setting aside I.A. No.1280/2000 will stand allowed. Writ Petition is allowed as above, in the circumstances, without any order as to cost. The Commissioner Sri.D.Sreekumar, who submitted his report dated 18.6.1997 himself will be appointed as the Commissioner. Since the suit is of 1996, the learned Munsiff will make every endeavor to see that the suit is disposed of at the earliest.

PIUS C. KURIAKOSE,

JUDGE.

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